

## Legal Coercion, Respect & Reason-responsive Agency

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(The final publication is available at <http://link.springer.com/article/10.1007%2Fs10677-013-9486-4>)

1.

There is a way of thinking about law that contemporary normative theorists on criminalization and legal punishment are particularly anxious about, and that way is to conceive law as involving legal coercion in the manner of threats. This way of conceiving law is unsurprising, especially when we look at criminal law; it prescribes requirements of conduct (e.g. do not murder) for which we are liable to be punished when we fail to conform to them (e.g. life imprisonment). It then seems they are just like coercive threats: do not murder, or else you will be imprisoned for life. Indeed, conceiving criminal law in this way is best suggested by a deterrence-based justification of punishment, where the justifiability of punishment lies mainly in its ability to deter people from committing crimes.<sup>1</sup> Under this picture, punishment is then seen as a kind of threat, which seeks to deter people from violating the requirements of conduct that are prescribed by the criminal law.<sup>2</sup>

Independent from the issue of whether conceiving law in this way actually corresponds to law as we find it in the real world,<sup>3</sup> what makes legal coercion morally problematic to normative theorists is that it is susceptible to the Hegelian objection: it treats “a man like a dog instead of with the freedom and respect due to him as a man” (Hegel 2001: §99 Addition). But in what sense does legal coercion fail to respect individuals in a way that is “due to him as a man”? And what are the grounds for this requirement to respect?

This paper is an attempt to answer these questions. I shall argue that legal coercion fails to respect individuals as *reason-responsive agents*, and that individuals ought to be respected as such *in virtue of the fact that they are human beings*. It is in this sense that I contend legal coercion fails to treat individuals with the kind of “respect due to him as a man”.<sup>4</sup> But first, let me explain what I mean by legal coercion, as it is targeted by the Hegelian objection.

2.

According to the Hegelian objection, legal coercion is objectionable because it treats people like dogs, rather than with the respect that is owed to them as ‘man’. But the objection here is not merely that since the laws in question are unjustified, threatening people with punishment fails to respect them. Rather, it is that even if the laws in question are *justified*, they still fail to respect

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<sup>1</sup> It is only ‘mainly’, because the justifiability of punishment also depends on other considerations; for example, the proportionality of punishment and only punishing those who are guilty.

<sup>2</sup> This is not confined only to those who hold a consequentialist justification of punishment. Even retributivists have reasons to conceive criminal law in this way, insofar as they think that the deterrence effect of the punishment that offenders deserve also constitutes an additional reason to impose the punishment in question, alongside the familiar retributivist reason that offenders deserve it. For such a retributivist position, see e.g. Tasioulas (2006: 285 & 302–305).

<sup>3</sup> And whether it involves coercion of other kinds as well; see Edmundson (1995), Lamond (2000) & Yankah (2008).

<sup>4</sup> Of course, there are other ways to flesh out the Hegelian objection; for example, in terms of the Kantian slogan of never treating people merely as means but always as ends. However, it is notoriously hard to pin down what this Kantian slogan exactly amounts to in a way that is satisfactory. See e.g. Duff (2001: 13). Note that Hegel does not therefore find all legal punishments unjustifiable because of this objection. Rather, he thinks that they are justifiable as ‘annulling’ criminal wrongdoings. See e.g. Kleinig (1991: 415–416).

people by threatening them with punishment. The alluded imagery here is that by threatening someone with punishment for, say for the example, the justifiable end of not attacking others, we are treating him in a way that might very well be less cruel, but nevertheless not all that different from, when we threaten to beat a dog with a stick to stop it from attacking others. But what exactly does legal coercion amount to when *the laws in question are justified*?

Assuming that they are justified; what the law threatens us *to do* or *not to do*, if and when it does threaten us at all, are things that we already have good (if not sometimes fully justified) reasons, independently from the threat itself, *for* or *against* doing anyway. Sometimes these independent reasons are pre-legal and moral in nature. This is the case for *mala in se* crimes. Quite apart from the threat of punishment, we already have good independent reasons against murdering, raping or stealing from others. Sometimes they are based on authority, as it is the case for *mala prohibita* crimes. If the law is justified in requiring us to pay 20% of our income as taxes, or to drive on the left, then this constitutes, independent from the threat of punishment, an (authority-based) reason for us to do so. Note that none of this implies that we have a general obligation to obey the law just because it is the law. Rather, the claim here is that if the laws in question are justified, then we already have a reason *to do* or *not to do* that which the law *requires* or *prohibits*. This reason might be a pre-legal moral one, or it might be authority-based, or may sometimes even be both; but it is a reason that is independent from the threat of punishment itself.

Understood in this way, legal coercion is therefore different from the coercive threats in gunman scenarios (see also Hart 1994: 19 & 79-85). The things that a gunman threatens one *to do* (or *not to do*), are normally things that one already has independent reasons *against* doing (or *for* doing); as in when he threatens one to shoot the guards in the bank or when he threatens one not to alert the police. Indeed, sometimes it might very well be things that one does not have any reasons, independent from the threat, to do or not to do, as in when he threatens one to lie down on the floor and not to make a noise.

Of course, it is possible to have a gunman who threatens one *to do* (or *not to do*) something that one already has independent reasons *for* doing (or *against* doing), just like in legal coercion. A morally righteous gunman who threatens us to perform our duties of charity would be an example of this. However, the issue here is not to identify something distinctive about legal coercion, in order to distinguish it from the coercive threats in gunman scenarios. Rather, it is to identify and highlight an aspect of the kind of legal coercion that is targeted by the Hegelian objection.

So, for the purposes of this paper, legal coercion involves threatening one *to do* (or *not to do*) something that one already has reasons, independent from the threat itself, *to do* (or *not to do*). But why does that fail to respect one in a way that is due to one as a 'man'? After all, the law is merely threatening us for something that we in any case have good independent reasons for anyway. What is so morally problematic with that?<sup>5</sup>

A small caveat before continuing: to say legal coercion fails to respect people and is therefore morally problematic, is not to say that it can never be justified. Rather, it is to say that it is at least a *prima facie* wrong, which requires other countervailing reasons (if there are any) before legal coercion can be justified. Thus even if legal coercion fails to respect people, it might nevertheless be justified *all things considered*. The arguments in the rest of this paper should therefore be seen as only accounting for the *prima facie* wrongfulness of legal coercion.

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<sup>5</sup> This was also explored by Dan-Cohen (1994), although he framed it in terms of how law's normative appeal is undermined by its use of coercion.

One argument against legal coercion is this: As a kind of coercive threat, legal coercion fails to respect the kind of independence that is required for autonomous agency. Assuming that respecting people as autonomous agents is due to them as ‘men’ (see e.g. Kant 1996: §6 434-435), legal coercion also therefore fails to respect them in a way that is due to them as ‘men’. Of course, ‘autonomy’ is a hugely complex notion which is used to mean a variety of things (Dworkin 1988: 5-6; Feinberg 1989: Ch 18). But central to the concept of ‘autonomy’ is the idea that an autonomous agent is ‘self-governing’ or ‘self-determining’ in some sense or another (Dworkin 1988: 12-13). When this is applied more generally to the life of the agent in question, his desires, preferences, wishes, commitments etc., we are talking about ‘personal autonomy’; when it is applied more specifically to the moral principles of the agent in question, we are talking about ‘moral autonomy’.<sup>6</sup> But insofar as we are talking about an agent as ‘self-governing’ or ‘self-determining’ in some sense or another, then this requires that the agent in question is independent from the external influences of others in some sense or another (Raz 1986: 148-157 & 377-378; Scanlon 1972: 215-217; Dworkin 1988: 21-33).<sup>7</sup> It is of course very tricky to determine exactly the kinds of external influences that are excluded by this: for example, do the authoritative teachings of one’s elders, or the culture in which one is brought up, count as the relevant kinds of external influences (see also Dworkin 1988: 18)? Be that as it may, the thought here is that coercive threats seem to be the paradigmatic kinds of external influences that are excluded here; and *inter alia* legal coercion is something that autonomous agents should be independent from.

As one may already notice, much of this argument hinges on what is meant by the ‘independence’ that is required for autonomous agency. One might understand it merely as only requiring that the agent in question ‘makes up his own mind’, for example, on the matters at hand (Scanlon 1972: 215-216). However, if ‘independence’ is understood so thinly, then this threatens to undermine the above argument against legal coercion. Insofar as legal coercion involves coercive threats, rather than physical coercion, it is still up to the agent in question to ‘make up his own mind’ whether he should acquiesce to it, or defy it and risk suffering the threatened sanctions. As Scanlon points out, “A coercer merely changes the considerations which militate for or against a certain course of action; weighing these conflicting considerations is still up to you” (Scanlon 1972: 216).

Scanlon might very well be too quick on this point. When we talk about coercive threats, we need to distinguish between those that operate in a more rational way, where it is plausible to say that it is still up to the agent himself to ‘weigh up the conflicting considerations’, from those threats that are so severe where this is not plausible anymore. Because of the severity of such latter kinds of threats, it seems more plausible to say that the agent is so terrified by them that this paralyzes his will and compels his acquiesce. Thus not all coercive threats are where it is still up to the agents themselves to make up their own minds about. That said, none of this undermines the objection against understanding ‘independence’ thinly. If, as we should, think of legal punishment in a humane way, which is just and proportionate to the crimes in question, then the kind of threats in legal coercion would most probably not strike us as so terrifying that they paralyze our wills. They would most probably be the former kind of threats, which operate in a more rational way, rather than the latter severe kind of threats. Thus legal coercion can still be compatible with the thin ‘independence’ that is required for autonomous agency.

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<sup>6</sup> But as Waldron (2005) argues, there is no reason to think that they are sharply distinct from each other.

<sup>7</sup> To put it in Dworkin’s terms, the kind of ‘independence’ that I have in mind here is procedural independence rather than substantive independence

What is therefore needed in the argument against legal coercion is not ‘independence’ merely as making up one’s own mind, but making up one’s own mind in a way that is free from coercive threats (Dworkin 1988: 18). However, as it currently stands here, this argument begs the question. What is needed here is *why* legal coercion is incompatible with the independence that is required for autonomous agency, not the *assumption* or *stipulation* that it is. We therefore need to ask the further question of why the ‘independence’ required for autonomy should be understood in this way that excludes coercive threats.

An attractive answer to the question is this: when we think about the ‘independence’ in autonomous agency, we are not just thinking of the agent as *simply* making up his mind for himself on what he should (or should not) do. Rather, we are thinking of the agent as deliberating in a way that is responsive to reasons; that is to say, he deliberates for himself what he should (or should not) do by appropriately responding to the reasons that bear on him.<sup>8</sup> Of course, the reasons that bear on an agent are not just narrowly limited to reasons of prudence or self-interest; they also include, but are not necessarily exhausted by, the pre-legal moral reasons and authority-based reasons that I mentioned in the previous section, as long as they are indeed reasons that apply to him. Thus the agent I have in mind here is also responsive to the latter kinds of reasons as well, and not just to the former kinds of reasons. This, however, does not imply that such an agent conforms perfectly to all the reasons that apply to him, since he might very well be ignorant to some of these reasons. But the thought is that when these reasons are brought to his attention, then he is one who would deliberate in a way that is responsive to them. For the sake of brevity, I shall refer to the kind of agent that I have in mind here as a ‘reason-responsive agent’.

It follows from all this that a reason-responsive agent must also have the requisite capacities to be responsive to reasons in the way described; but I take such requisite capacities as a necessary condition for being such an agent, rather than a sufficient condition.

Now, if reason-responsive agency is what we have in mind when thinking about the ‘independence’ that is required for autonomous agency,<sup>9</sup> then it becomes clear why legal coercion is incompatible with such ‘independence’. Recall that, as discussed in the previous section, legal coercion involves threatening one *to do* (or *not to do*) what the law justifiably *requires* (or *prohibits*), to which one already has reasons, independent from the threat itself, *to do* (or *not to do*). Given that is the case, it therefore seems that legal coercion subverts or undermines reason-responsive agency, and hence the ‘independence’ required for autonomy. Rather than allowing individual agents to appropriately respond to the pre-legal moral or authority-based reasons that bear on them, and deliberate for themselves to do what the law justifiably requires;<sup>10</sup> legal coercion seeks to bypass all this. Through the threat of punishments, it creates and appeals to prudential reasons bearing on individual agents, so that they would deliberate to do what the law justifiably requires by responding to these reasons, instead of those pre-legal or authority-based reasons. It is

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<sup>8</sup> Mill, for example, seems to have something like this in mind when he says, “He who chooses his plan for himself employs all his faculties. He must use *observation to see, reasoning and judgement to foresee*... It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and call it forth, *within the limits imposed by the rights and interests of others*, that human beings become a noble and beautiful object of contemplation” (1974: 123 & 127, my italics).

<sup>9</sup> For the purposes of this paper, I am trying to avoid getting into the debate on how best to understand the nature of autonomous agency. But if I were to commit myself to one, then what I have discussed here suggests an externalist understanding of autonomous agency. For the distinction between this, and an internalist understanding, see e.g. Buss (2008).

<sup>10</sup> For the sake of clarity and simplicity in the rest of this paper, I shall put aside the case of ‘what the law prohibits’. I do not think that my arguments will be affected by this.

in this sense that legal coercion fails to respect individuals in a way that is due to them as ‘men’, or so the argument goes.

One might object that reason-responsive agency, as discussed above, implies that someone who has ‘weakness of will’ is not an agent in the relevant sense. I do think that is the case, at least he is not one at the moments when he succumbs to his ‘weakness of will’. However, at least for the purposes of this paper, nothing really hinges on whether someone who is weak-willed is a reason-responsive agent or not. Even if he is not, it does not follow we are then not required to respect him in the same way as someone who indeed is a reason-responsive agent, as long as he has the requisite capacities to be one. This is because, as I shall argue later in section 5, this requirement of respect is *not* grounded on the fact that someone is a reason-responsive agent, which then loses its normative force when it turns out that he is actually not a reason-responsive agent. Thus even if someone who is weak-willed is not a reason-responsive agent, it does not nullify the requirement that we should nevertheless respect him as one. In the account of respect that I am expounding here, what it means to be a reason-responsive agent fleshes out the general form that this respect takes. But when it comes to *why* we should respect someone in this way, it is not because of the fact that he is a reason-responsive agent. Rather it is the fact that he is a human being. In other words, it is because he is a human being that we should respect him as a reason-responsive agent. I shall come back to this later in the paper.

4.

I do think that the last argument against legal coercion is in the right direction. I agree that we should see individuals as reason-responsive agents in the way described; and that the problem with legal coercion has something to do with reason-responsive agency. However, there seems to be a tension within the argument as it currently stands, more specifically between reason-responsive agency and the claim that legal coercion somehow subverts or undermines it. The argument argues that legal coercion creates and appeals to prudential reasons bearing on individuals, so that they would deliberate to do what the law justifiably requires by responding to these prudential reasons, rather than the pre-legal moral or authority-based reasons that originally bear on them independent from the threat of punishment. However, the argument also asks us (I think rightly) to see individuals as reason-responsive agents who deliberate for themselves what they should do by appropriately responding to the reasons that bear on them. But if we are to see them in this way, then given the presence of these pre-legal moral or authority-based reasons and assuming that individuals are not ignorant of them, we would then see individuals (qua reason-responsive agents) as responding to these pre-legal or authority-based reasons in deliberating to do what the law requires. From this point of view, the prudential reasons, allegedly created and appealed to by legal coercion through the threat of punishment, therefore seems to be neither here nor there in the deliberation to do what the law requires. They are ‘epiphenomena’ so to speak. If that is the case, then how does legal coercion subvert or undermine reason-responsive agency, if we are to also see people as reason-responsive agents at the same time?

If I am correct about this tension, then it suggests that rather than saying legal coercion somehow *subverts or undermines reason-responsive agency*, we should say that it *fails to see someone as a reason-responsive agent*.<sup>11</sup> It is in this sense that I contend legal coercion fails to respect people in a way that is due to them as ‘men’.

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<sup>11</sup> I take this to imply that the kind of respect in question is a kind of ‘recognition respect’ (Darwall 1977: 38), i.e. recognizing someone as a reason-responsive agent. I nevertheless choose to use the language of ‘seeing’ here instead, because the language of ‘recognition’ portrays reason-responsiveness too much like a (contingent) fact about

Legal coercion is a way of modifying peoples' behavior to do what the law justifiably requires, by getting people to deliberate for themselves accordingly in response to the threat of punishment; and such threats involve, as I have explained earlier in section 2, threatening them to do what they already have reasons (be it pre-legal moral or authority-based), independent from the threat itself, to do. But if we really do see them as reason-responsive agents, then bringing their attention to these pre-legal moral and authority-based reasons would be more than enough to get them to deliberate for themselves to do what the law justifiably requires. This is because as reason-responsive agents, they would appropriately respond to these reasons and deliberate accordingly. In resorting to threats, rather than these pre-legal moral and authority-based reasons, we are therefore not seeing the individual in question as someone who deliberates for himself accordingly by appropriately responding to these latter reasons. In other words, we are not seeing him as a reason-responsive agent.

Of course, there is a minimal sense in which legal coercion still sees the individual in question as a reason-responsive agent; and that is as someone who responds narrowly to prudential reasons or reasons of self-interest, which the threat of punishment creates and appeals to. But as discussed before, a reason-responsive agent is not just narrowly responsive to only prudential and self-interested reasons, he is also responsive to other reasons that bear on him as well; and this includes the pre-legal moral and authority-based reasons that underlie what the law requires him to do. Thus in resorting to threats, rather than bringing these reasons to attention, legal coercion fails to recognize this further, but equally important, aspect of reason-responsive agency; and to that extent it fails to see the individual in question as a reason-responsive agent.

So, the argument against legal coercion here is basically this: In resorting to the threat of punishment, rather than the pre-legal moral or authority-based reasons that underlie what the law justifiably requires, legal coercion fails to see individuals as reason-responsive agents in its attempt to get individuals to deliberate accordingly. It is in this sense that I want to claim that legal coercion fails to respect them as reason-responsive agents. It also means that, at least in this context, adequately respecting them as reason-responsive agents involves offering and bringing their attention to these pre-legal moral reasons and authority-based reasons, when trying to modify their behavior to do what the law justifiably requires of them. I shall call this account of respect (rather blandly) 'respecting people as reason-responsive agents'.<sup>12</sup>

Note that this account of respect is intended to apply only to the kind of coercive threats that I have previously highlighted in legal coercion: cases where there are already reasons, independently from the threats, to do (or not to do) that one is threatened to do (or not to do); or more simply, cases where the independent reasons bearing on individuals are *directed to the same actions* as the threats themselves. The account is not intended to apply to other kinds of coercive threats where this is not the case. However, this does not mean that these other kinds of coercive threats are not morally problematic. In addition to the fact that some coercive threats might very well be so severe that they are incompatible with the thin 'independence' required for autonomous

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individuals, to which we come to recognize when respecting them accordingly. As I shall argue in the next section, we should avoid understanding respect in this way.

<sup>12</sup> Unfortunately, what exactly this involves in relation to law, especially the criminal law, is an extensive issue that requires a separate discussion in its own right. By way of some suggestions, I believe this involves conceiving punishment in more communicative terms. It also affects how laws should be promulgated in the first place (see e.g. Duff 2001 & 1998 respectively). Furthermore, insofar as there are limits to law's ability to bring people's attention to the above mentioned reasons, it also suggests there is a role to be played by extra-legal institutions, like education and other social institutions, when it comes to respecting people as reason-responsive agents. See also the end of section 5.

agency (as discussed in section 3), other kinds of coercive threats are morally problematic for reasons related to, in a different way, to reason-responsive agency, or something else altogether depending on the case at hand. Thus in cases where the independent reasons and the threats are *directed to opposing actions*; e.g. where someone is threatened *to do* (or *not to do*) that which he originally and independently has reasons *against* (or *for*) doing. What is morally problematic here is not that the coercer is not respecting the coercee as reason-responsive agent. Rather, in issuing that threat, he is *preventing* the coercee from responding appropriately to the reasons that he originally and independently has. An extreme example of such a case is when one is threatened to murder someone at gun point. On the other hand, one might be threatened for something that one originally and independently does not have reasons for or against, as when one is threatened at gun point to hand over one's wallet to a robber on a street.<sup>13</sup> With regard to such cases, I tend to believe that what is morally problematic is that the coercive threats *undermine one's freedom*, rather than for reasons relating to reason-responsive agency. Thus I do not subscribe to a unitary account of why coercive threats are, at the very least, *prima facie* wrongs, when they are so. Rather, I believe that they are wrongs for a variety of different reasons, depending on the specific case at hand.

Indeed, it is an advantage of such a pluralistic account that it fares better in dealing with issues raised by conditional offers, which are very similar in structure to coercive threats. There is, of course, the issue of how to define coercive threats in a way that distinguishes them from conditional offers (Anderson 2011); but given their structural similarities, some have argued that certain accounts of why coercive threats are wrongful inevitably also makes all conditional offers wrongful for the same reasons (Sachs 2013: 72). However, under this pluralistic account, some conditional offers which involve offering one *to do* (or *not to do*) something that one already has independent reasons *for* (or *against*) - e.g. you offer a million pounds for me to refrain from murder - also fails to respect one as a reason-responsive agent, just like in legal coercion. Similarly, offering a million pounds for me to murder, just like threatening me at gun point to murder, is a wrong; but what is wrong here is *encouraging* me to not respond appropriately to reasons that I originally and independently have, rather than *preventing* me from doing so. Finally, while threatening one for something that one originally and independently does not have reasons for or against undermines one's freedom; yet usually when one is conditionally offered it, one's freedom is increased. Thus unlike its coercive counterpart, such conditional offers are not wrongs. I take it that paradigmatic examples of these are conditional offers in market exchanges. Of course, they might still be exploitative, even when they increase one's freedoms as compared to before the offer was made. If that is the case, then such exploitative conditional offers are wrongs for precisely this reason (Lyon 1975).

Of course, much more needs to be said to defend such a pluralistic account of the wrongfulness of coercive threats, but I shall have to leave it for another occasion, given that this paper is concerned with the kind of coercive threats in legal coercion. In any case, I hope that I have shown how such coercive threats in legal coercion fail to respect people as reason-responsive agents, and therefore we should rightly find them morally problematic; but also why although this would make offering a million pounds to me for refraining from murder a wrong for the same reason, it does not necessarily make all conditional offers wrongful, especially those found in free market exchanges.

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<sup>13</sup> I take it that one does not have an independent reason against handing one's wallet to him, which might not be the case if the robber is a career criminal who uses his stolen money to fund his criminal activities.

So far I have argued that legal coercion fails to see individuals as reason-responsive agents, by resorting to threats, rather than by offering to individuals the independent (pre-legal moral or authority-based) reasons that bear on them, when trying to modify their behavior to do what the law justifiably requires of them. However, I have said nothing about why individuals should be seen and treated in this way. In the following, I shall tentatively outline the argument for why we should respect people as reason-responsive agents in the sense I argued for.

One easy way to argue in favour of this requirement of respect is that individuals are indeed reason-responsive agents in the way I have described: they deliberate for themselves what they should (or should not) do by appropriately responding to the reasons that bear on them. Since it is plausible to suggest that all this is of value, we therefore should, when we try to modify individuals' behavior, do it in such a way that fully recognizes it; and as the argument against legal coercion shows, the way to do this, at least in this context, is offer to them the independent reasons that they have to do what the law justifiably requires. It is by doing so that we are fully recognizing them as being responsive to reasons in the relevant sense.

However, the problem with this argument is that the empirical claim – individuals are indeed reason-responsive agents in the way I have described – is just blatantly false. Even putting aside those individuals who are so mentally disabled that they lack the requisite capacities to start with, the extent to which individuals respond accordingly to reasons vary significantly in real life. Not only can it vary from one situation to the next for any one given individual, it can also vary inherently from one individual to the next. Thus even if we hold constant the situation in question, some individuals might very well do so to the fullest extent. Respecting them as reason-responsive agents would then involve merely offering to them the relevant independent reasons. However, there are also individuals who only do so to a certain extent, or maybe to an even lesser extent when compared to others. For such individuals – say they are only limited to responding to prudential reasons, but not the relevant pre-legal moral or authority-based reasons that they have – by offering to them prudential reasons when we try to modify their behavior, we are indeed fully recognizing their responsiveness to reasons. This argument therefore implies unequal respect for individuals, depending on the contingent extent to which they respond to reasons accordingly. This, I take it, is the notorious problem of grounding equal respect to individuals on scalar properties that individuals have.<sup>14</sup>

I do think that respect is owed equally to individuals as reason-responsive agents, despite the fact that they respond to reasons accordingly in varying degrees in real life. Nevertheless, I think there is a grain of truth in the above argument, that there is value in being the kind of agent that is responsive to reasons in the way described; and that the value of human beings lies, at least partly, in doing so.<sup>15</sup> However, the problem with the above argument is in conceiving respect in terms of responding to this value *as it is contingently exhibited by the said individual*. What I want to suggest, at least in this context, is a different approach to the issue of respect: rather than seeing respect as *responding* to values in individuals, we should see respect as *conferring or according* values owed to individuals. An analogy with artworks may help to illustrate the thought here.

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<sup>14</sup> A recent excellent take on this problem is Carter (2011). However, while his account of 'opacity' respect can exclude legal coercion understood in terms of specific or special deterrence, it would not exclude legal coercion understood in terms of general deterrence.

<sup>15</sup> Unfortunately a full defense of this is not possible here given the purposes and length of this paper, but see e.g. Nussbaum (1992: 202 & 222-223). See also n 8. Furthermore, pace the charge of anthropocentric speciesism, I do not claim that this makes human beings distinctively valuable or more valuable than other kinds of non-human animals.



The artistic value as it is contingently exhibited by an artwork varies greatly from one artwork to the next (for example, compare Duchamp's *Fountain* with Michelangelo's *David*). Yet, despite this, insofar an object is an artwork, we ought to treat it as such, in a way that exhibits its value as an artwork. For example, we should not use the painting as a table mat or the sculpture for hanging clothes (or use Duchamp's *Fountain* as a toilet). In doing so, we are seeing it as having the value of an artwork irrespective of the artistic value that it contingently exhibits, i.e. that it is not merely something to be used for other purposes, but something to be appreciated in itself. It is in this sense that we confer or accord to it the value of being an artwork, when treating it in a way that exhibits its value as an artwork, which we ought to in virtue of the fact that it is a piece of artwork, and not a table mat or clothes hanger etc.

Analogously, insofar as an individual is a human being, we ought to treat him as such, in a way that exhibits his value as a human being; and this value lies (as I have conceded earlier) at least partly in being a reason-responsive agent in the way described. Thus, irrespective of the contingent extent to which he responds to reasons accordingly, we should be offering him the independent (pre-legal moral or authority-based) reasons that bear on him when modifying his behavior to do what the law requires. This is because in doing so, we are seeing him as having this value, as someone who is responsive to reasons in the relevant sense, and thus are treating him in a way that exhibits his value as a human being. It is in this sense that respecting someone as a reason-responsive agent, in the way I have described, confers or accords to him the value of being a human being, which is owed to him in virtue of the fact that he is a human being.

Under this understanding of respect, what grounds the requirement to respect is not the contingent extent to which individuals respond to reasons accordingly (which varies from one individual to the next, and from one situation to the next), but the fact that individuals are human beings. Although this fact is contingent, I do not think that it comes in degrees. Either you are a human being, or you are not. If one is a human being, then one cannot be a more or less human being. Thus a mentally disabled human being is not a lesser human being than a mentally fit human being. Neither is a mentally fit human being a more human being than a mentally disabled human being. The former might be able to exercise more of the functions that are characteristic of human beings than the latter. But all that means is that as human beings they have differing abilities, and the former happens to have more of the abilities that most other human beings have. This, however, does not detract from the fact that both of them are human beings.

Under this account, what therefore really matters when it comes to why we should respect individuals as reason-responsive agents is the contingent fact that they are human beings. Of course, it is a necessary condition to respect an individual as someone who responds to reasons accordingly, that he has the requisite capacities in question; just as that is also a necessary condition for being a reason-responsive agent. Thus for those who are so severely mentally disabled that they lack the said capacities, we are not required to respect them as reason-responsive agents under this account, even though they are in fact human beings.<sup>16</sup> But insofar as this is not the case with regard to the individuals in question, then we are required to, according to this account, respect them as such. Note that what gives rise to this requirement is not that they have the requisite capacities in question, but the fact that they are human beings. It is because they are human beings that we are required to respect them as reason-responsive agents, not because they have the said capacities in question. Whether or not they have them functions more like, under this account, the condition

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<sup>16</sup> This does not mean we do not owe anything towards individuals who lack the said capacities. Although respecting individuals as reason-responsive agents is an important moral requirement, it does not exhaust all the moral concerns that we owe to fellow human beings.

under which this requirement of respect bears on us; but what grounds this requirement, when it does bear on us, is the fact that the so concerned individuals are in fact human beings.

Although the contingent extent to which individuals respond to reasons accordingly does not matter when it comes to *why* we should respect them as reason-responsive agents, insofar as they have the requisite capacities in question; it does matter when it comes to the *material form* that respecting them as reason-responsive agents should take, when this requirement bears on us. Thus to illustrate this briefly: If the individual in question responds to reasons accordingly to the fullest extent, then respecting him as a reason-responsive agent might just consist in merely reminding him of the independent reasons he has for doing what the law requires. But if the individual in question only does so to a lesser extent, then it does not consist in merely reminding him of these reasons that he has, it also consists more substantively in: persuading and encouraging him to think more deeply about the reasons that he has, drawing his attention to and inviting him to consider other reasons that he might have, pointing out and bringing into light possible mistakes in his reasoning and possible ignorance on his part etc...; in short, attempting to bring him to see he has pre-legal moral and authority-based reasons to do what the law requires, through engaging in a dialogical exchange of reasons and arguments with him. All these various forms of respect duly recognize the significance of deliberating for oneself what one should (or should not) do by appropriately responding to the reasons that bear on one, in light of contingent extent to which individuals do so. They confer on or accord to individuals, in various ways attuned by their contingencies, the value of being human beings, which is owed to them in virtue of the fact that they are human beings.

Of course, much more work is required to substantiate what I discussed above, especially on conceiving respect as conferring or according values owed to individuals. But that would require a separate paper in its own right. Nevertheless, I hope my above discussion has shown that there can plausibly be an argument for why we need to respect people as reason-responsive agents in the sense I described, which is grounded in the value of being responsive to reasons, in a way that still supports equal respect among different individuals.

6.

Before concluding this paper, I would like to address two general, but related, objections to the account of respect that have been discussed so far.

I have argued that we ought to see and recognize individuals as reason-responsive agents, even when they are in fact not reason-responsive in the relevant sense, as long as they have the requisite capacities in question. One might object that this amounts to no more than a fiction: we are asked to see them as reason-responsive agents, when it is not the case that they are.

This might very well be true, but if the argument in the last section is sound, then there are good reasons to see and recognize individuals as reason-responsive agents (to hold onto the fiction so to speak), even when they are in fact not reason-responsive in the relevant sense. This is because, as the above argument goes, it is by doing so that we are treating them in a way that exhibits the value that they have as human beings, and confers or accords to them that value, which is owed to them in virtue of the fact that they are human beings. The argument here has the same structure as the one used by moral fictionalists, who argue that even though our realist moral discourse is false, there are still good reasons to retain it, and continue on engaging in it as if it was true (see e.g. Nolan et al 2001: 308-314). Similarly, even if individuals are not in fact reason-responsive, there are still good reasons to see and recognize them as such; or so I try to argue. Note that I am not trying to defend moral fictionalism here, I am merely highlighting the kind of argument that is being offered.

Relatedly, one might object that reason-responsive agency, which underlies the account of respect defended here, is just too ideal. Human beings, as Ashworth and von Hirsch persuasively argue, "... are moral but fallible creatures – capable of being motivated by normative appeals, but sometimes strongly inclined to offend nevertheless"; and thus, "we require a response that both takes humans' capacity for moral judgement seriously and yet provides them with disincentives that can help them to control their inclinations" (2005: 23). Thus as long as legal coercion supplements (as opposed to replacing) the offering of the independent (pre-legal moral or authority-based) reasons that individuals have to do what the law requires, it is still respecting them appropriately (von Hirsch 1996: 42-45; but see Duff 2001: 86-88).

To be sure, individuals would then *not* be respected as reason-responsive agents in the sense I have discussed. This is because doing so involves seeing them as someone who would appropriately respond to the independent reasons that they have and deliberate accordingly; and the above objection precisely denies this in asserting that individuals are 'fallible' in this respect, thus giving rise to the need of legal coercion as supplements. But the thought here is that it might nevertheless be respecting them appropriately, if we bear in mind this more 'realistic' understanding of human agency.

I agree that human beings, as they are found in everyday life, are moral but fallible in the way described. But I am just not sure whether we should, just because of this, put aside a more 'idealized' understanding of agency and opt for a watered down understanding, when thinking about the respect that is owed to individuals. It seems that doing so is like arguing that since a moral requirement is too 'idealized' and removed from what people are and will be doing, we should tone it down to reflect empirical realities. Of course, if what is asked of us here is just impossible (e.g. we are required to ensure that everyone is happy all the time), then this suggests that there is something wrong with the moral requirement. But here we are not asked to be reason-responsive agents all through our lives, which might very well be impossible. Rather, we are asked to see other human beings as reason-responsive agents, when we try to modify their behavior to do what the law requires; and that, it seems to me, is not impossible.<sup>17</sup>

Part of the objection here also turns on the element of 'hard treatment' in legal punishment. Whether this element, if it is to be justified at all, can only be justified in terms of prudential deterrence; or whether it can also be justified under, say for example, a communicative account of punishment (Ashworth & von Hirsch 2005: 21-27; Duff 2001: 82-88 & 106-115). Those who opt for the former would then find the objection more favourable. However, I am more optimistic to the possibility of the latter, though I have to leave my defense of this for another occasion; and even if it turns out it cannot be justified in any other ways than in terms of prudential deterrence, then so much the worse for 'hard treatment' as a justifiably element in legal punishment.

That said though, as I have pointed out earlier at the end of section 2: Even if 'hard treatment' as an element in legal punishment fails to respect people as reason-responsive agents, because it is a form of legal coercion, it is still only a *prima facie* wrong. Thus it might nevertheless be justified *all things considered* because of, say for example, the social security that can be attained by having this element in legal punishment. But even in such a case, 'idealized' reason-responsive agency at least has the virtue of highlighting the moral costs that are involved for the

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<sup>17</sup> There might also be the worry of over-demandingness here. However, when exactly a moral requirement is objectionably demanding is very elusive: Is the requirement to respect here, which is only a *prima facie* requirement that can be outweighed by other considerations in different circumstances (see text below and also the end of section 2), objectionably demanding? For more on the over-demandingness objection as it is used in moral philosophy, see e.g. Sobel (2007).

sake of social security. Costs that we should confront and face up to, even when they are justified,<sup>18</sup> but which would have been hidden and masked by a watered down understanding of agency.

7.

This paper has tried to demonstrate that legal coercion fails to respect people as reason-responsive agents. Respecting people as reason-responsive agents involves, at least within the context that concerns this paper, offering to them or bringing their attention to the pre-legal moral or authority-based reason that they have, independent from the threat of punishment, to do (or not to do) what the law justifiably requires (or prohibits). It is by doing so that we are fully recognizing and seeing them as reason-responsive agents. Legal coercion is therefore morally problematic precisely because it does not involve this, and to that extent it fails to see people as reason-responsive agents and therefore fail to respect them as such. We are required to respect people in this way, I have argued, because by doing so we confer or accord to them the value of being human beings, which is owed to them in virtue of the fact that they are human beings. Thus accordingly, by failing to respect people as reason-responsive agents, legal coercion fails to treat them with the 'respect that is due to them as men'.

Although I refer to this account of respect in terms of 'reason-responsive agency', I do not intend it to compete with accounts that are based on autonomous agency. Indeed, throughout this paper, I have situated my arguments as a way of fleshing out the kind of 'independence' that is required for autonomous agency; but without committing myself necessarily to a specific understanding of autonomous agency, by offering independent arguments for my account at various places. The hope is that irrespective of the debate on how best to understand autonomous agency, and the respect required for it, we can still develop, argue for and defend a kind of respect that is captured by the Hegelian objection to legal coercion. Whether or not the kind of respect expounded in this paper is part and parcel of the respect to autonomous agency remains, for my purposes, an open question.

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<sup>18</sup> Thus it might simply be a price we have to pay in order to not fail in protecting others adequately.

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